



UNITED STATES DEPARTMENT *of* JUSTICE

# Exemption 5

## *The Civil Discovery Privileges*



## *Exemption 5*

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”



## *Exemption 5*

### *What does this mean?*

Exemption 5 incorporates civil discovery privileges into the FOIA. This prevents requesters from using the FOIA to get documents that would be privileged in discovery.



## *Exemption 5*

Two requirements:

- 1) An inter-agency or intra-agency memorandum or letter (part 1), and
- 2) There must be an applicable discovery privilege (part 2).



## *Part 1: Threshold*

“Inter-agency or intra-agency memorandums or letters.”



## *The Exemption 5 Threshold*

### *Expansion of the Exemption 5 Threshold: The “Consultant Corollary”*

The Exemption 5 threshold has been expanded to cover situations in which an agency receives documents from an outside party, as part of that outside party’s attempt to offer advice to the agency that the agency has asked for.



## *Consultant Corollary: Who is a Consultant?*

- Such advice can “play[] an integral function in the government’s decision[making]” (Soucie) and is meant to cover situations where outsiders are functioning as though they were agency employees.
- Consultants can be those who have a formal, contractual, paid relationship with an agency (Hoover v. Dep’t of the Interior) as well as those consulted by the agency on an unpaid volunteer basis. (Wu v. NEH, NIMJ v. DOD.)



## *Consultant Corollary: Who is a Consultant?*

- Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 US 1 (2001).
- In Klamath, the Department of the Interior had consulted local Native American tribes on assignment of water rights. Significantly, the tribes were among many applicants for the water rights.





## *Consultant Corollary: Who is a Consultant?*

- The Supreme Court ruled that the tribes could not be considered “consultants” to the Department of the Interior.
- The Court explained that an outsider cannot be a consultant when the outsider is:
  - seeking a government benefit
  - at the expense of another party.



## *Miscellaneous Threshold Issues*

- Advice from a consultant must be coming into the agency, not from the agency.
- Thus, while an agency can protect advice it receives from Congress (Ryan v. DOJ), it cannot protect advice it provides to Congress (Dow Jones v. DOJ).



## *Miscellaneous Threshold Issues*

However: An agency may protect advice it provides to a presidentially created commission, such as NEPDG. (Judicial Watch v. DOE.)



## *Miscellaneous Threshold Issues*

Common Interest Doctrine: The threshold will cover documents exchanged with an outside party that the agency is pursuing a common interest with, but only after the point at which the agency decides to enter into a common interest agreement. Documents created while the outside party is seeking the agreement itself will not meet the threshold. (Hunton & Williams v. DOJ.)



## *Part II: Discovery Privileges*

- Exemption 5 incorporates all civil discovery privileges into the FOIA. (Martin v. Office of Special Counsel.)
  
- However, in practice only a few come up with any degree of regularity:
  - The deliberative process privilege;
  - The attorney work-product privilege;
  - The attorney-client privilege.



## *The Deliberative Process Privilege*

Agencies may withhold documents which reflect deliberative, predecisional communications.

Purposes of the privilege

- encourage open, frank discussion
- protect against premature disclosure of proposed policies
- guard against public confusion from release of reasons and rationales that were not ultimately the basis for agency decisions.



# *The Deliberative Process Privilege*

## *Protects Process*

- The privilege exists to protect the integrity of agencies' decisionmaking processes.
- It may be invoked to protect documents where release would harm the decisional process.



# *The Deliberative Process Privilege*

## *Effect of Time*

- An agency's ability to use the privilege is not affected by the passage of time.
- There may be less sensitivity with release of older documents, and as a result they are strong candidates for discretionary disclosure.





# *The Deliberative Process Privilege*

## *Elements*

The agency must show that the withheld information reflects communications that are:

- predecisional and
- deliberative.



# *The Deliberative Process Privilege*

## *“Predecisional” Defined*

Predecisional communications are those that are antecedent to the adoption of an agency policy.



## *The Deliberative Process Privilege*

### *Predecisional: Identify Decisionmaking Process*

- An agency must identify a decisionmaking process that promoted the creation of the withheld documents.
- Final agency decision is not required. Courts have recognized that agencies sometimes decide not to decide.



## *The Deliberative Process Privilege*

### *Predecisional: Eligible Information*

- The privilege can extend to documents created by the decisionmaker as part of her own deliberative process. (Judicial Watch of Fla. v. DOJ.)
- It also extends to documents that do not end up being considered by the final decisionmaker at all. (Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.)



# *The Deliberative Process Privilege*

## *Postdecisional Documents*

- Postdecisional documents are not protected by the privilege.
- These documents typically reflect an agency's final position on an issue, or explain an agency's actions. They may have the force of law.



# *The Deliberative Process Privilege*

## *Postdecisional Documents*

- Public has the right to be informed of official agency positions.
- However, what is postdecisional to one decision may be predecisional to a subsequent decision.



# *The Deliberative Process Privilege*

## *Is it Predecisional or Postdecisional*

Things to consider in making this determination:

- Did the author of the document possess decisionmaking authority? Note that courts may look “beneath formal lines of authority to the reality of the decisionmaking process.” (Schlefer v. United States.)
- In what direction does the document travel along the decisionmaking chain? Documents that go from subordinate to superior are more likely to be predecisional, though predecisional documents sometimes travel in the opposite direction as well.



# *The Deliberative Process Privilege*

## *Losing Predecisional Status:* *Incorporation/Adoption*

A predecisional document can lose its predecisional status if it is incorporated or adopted by the agency.





# *The Deliberative Process Privilege*

## *Incorporation*

Incorporated: The decisionmaker expressly cites a previously predecisional document as the rationale for an agency's decision.



# *The Deliberative Process Privilege*

## *Adoption*

Adopted: A previously predecisional document comes to be used by the agency as the embodiment of agency policy.



## *The Deliberative Process Privilege*

*Retaining Predecisional Status:*

*No Express Approval*

- Sometimes decisionmakers adopt a bottom-line recommendation in a document without expressly indicating approval of the rationale(s) for the recommendation.
- Those rationale(s) are protectable under DPP.



# *The Deliberative Process Privilege*

## *“Deliberative” Defined*

Deliberative communications are those that are offered in support of the agency’s decisionmaking process.



# *The Deliberative Process Privilege*

## *Deliberative Information*

Withheld information must reflect deliberative communications, such as:

- Recommendations
- Proffered opinions (e.g. “I believe that,” “In my opinion,” etc.).



# *The Deliberative Process Privilege*

## *Deliberative Documents*

Examples of deliberative documents:

- **Briefing materials** -- documents that summarize issues and advise superiors, either generally or in preparation for testimony or some other specific event.
- **Drafts** -- draft documents, by their very nature, are typically predecisional and deliberative, though agencies should be careful not to protect a “draft” that has defacto come to represent the agency’s official position on an issue.



# *The Deliberative Process Privilege*

## *Deliberative Documents*

- Courts have also extended Exemption 5 protection to situations where disclosure would reveal some protected aspect of the agency's deliberative process.
- In very rare circumstances an agency may be able to protect the identity of the author of a deliberative document, if there is genuine fear that disclosure of this information itself might chill agency deliberations. As a general rule, however, this information is released.



## *The Deliberative Process Privilege*

### *Duty to Segregate Factual Information*

- The deliberative process privilege only applies to deliberative portions of documents.
- Agencies must segregate out and release factual portions of the responsive document(s).





# *The Deliberative Process Privilege*

## *Duty to Segregate Factual Information*

Factual materials can be protected where:

- factual portions of a document are “inextricably intertwined” with deliberative portions
- selection and inclusion of some factual material constitutes a deliberative judgment by a document’s author (Mapother v. DOJ)
- “elastic facts” – when “facts” are not really set in stone, such as cost or budget estimates, and where the estimates reflect agency deliberations and disclosure could have a chilling effect. (Quarles v. Dep’t of the Navy.)



## *The Attorney Work-Product Privilege*

In order to withhold documents using this privilege, two criteria must be met. The privilege protects documents that were:

- 1) created by or at the direction of an attorney,  
and
- 2) were created in reasonable anticipation of litigation.



# *The Attorney Work-Product Privilege*

Prepared by or at the direction of an  
attorney.



# *The Attorney Work-Product Privilege*

## *In Reasonable Anticipation of Litigation*

- Though a specific claim need not have been actually filed, the privilege will not apply until an articulable claim likely to lead to litigation has arisen.
- Applies to documents created in civil and criminal litigation, administrative proceedings , in an effort to settle claims, as well as recommendations to close a case or to decline prosecution.
- But it does not cover documents created subsequent to the closing of a claim.



## *The Attorney Work-Product Privilege*

- The privilege does not apply to documents created in an agency's normal course of business.
- A document must meet the criteria for the privilege at the time of its creation in order to be covered by the privilege.



## *The Attorney Work-Product Privilege*

- Finally, the privilege covers both factual and deliberative materials, so unlike with the deliberative process privilege, agencies are not required to segregate out and release factual portions of attorney work-product documents. (Judicial Watch v. DOJ.)



## *The Attorney-Client Privilege*

- Protects confidential information supplied from client to attorney, as well as the attorney's advice based upon client supplied information.
- Unlike attorney work-product, the attorney-client privilege is not limited to situations involving litigation.
- As with work-product, the attorney-client privilege applies to both factual and deliberative materials.



# *The Attorney-Client Privilege*

## *“Confidential” Defined*

Communications can be considered confidential when the specific information conveyed is confidential, even though the underlying subject matter is known to third parties.

(Upjohn v. U.S.)





## *The Attorney – Client Privilege*

### *Who is the “Client”?*

- Upper-level, “control group” personnel, and
- Lower-level officials whose participation may be necessary in order to provide the attorney with the information they need in order to provide advice. (Upjohn v. U.S.)



# *The Attorney-Client Privilege*

## *Attorney-Client Exception*

An attorney-client document cannot be protected if it serves as an authoritative statement of agency law. (Tax Analysts v. IRS.)



## *Conclusion: The Rule of 2*

- Always remember that Exemption 5 has 2 parts (threshold and privileges); the agency must satisfy both parts of the Exemption in order to withhold a document
- Also, each of the three main privileges has 2 parts:
  - **Deliberative process** – predecisional and deliberative
  - **Attorney work-product** – prepared by or at the direction of an attorney in reasonable anticipation of litigation
  - **Attorney-client** – protects confidential facts and advice given based on this confidential information



## *Exemption 5 and the Holder Memorandum*

Under the terms of Attorney General Holder's FOIA Guidelines, the agencies should only withhold documents if there is a foreseeable harm in release. Moreover, the Attorney General has encouraged agencies to make discretionary disclosures whenever possible. Because Exemption 5 is a permissive, and not a mandatory exemption, these standards are particularly important for agencies to consider in the context of Exemption 5.

attorney-client document cannot be protected if it serves as an authoritative statement of agency law. (Tax Analysts v. IRS.)



## *Exemption 5 and the Holder Memorandum*

Before invoking Exemption 5, agencies should be careful to make a determination of whether there is foreseeable harm in release of the documents, and if not, discretionary disclosures (of all or part of the documents) should be made.